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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIE ALBERT SMITH,

Petitioner,

- against -

STATE OF MISSISSIPPI, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Where defense counsel is competent in some of the cross-examination of prosecution witnesses at a capital trial but is absolutely supine in the face of the prosecution's aggressive thrust at voir dire and in closing argument and fails to protect his client's interests at trial against the argumentative approach of the prosecution, may counsel be deemed to have rendered his client ineffective assistance?

2. Should the standard for counsel's ineffective assistance be the farce and mockery test or should that standard be uniformly replaced by the "reasonable competence" standard?

3. Where police enter a dwelling under exigent circumstances without a warrant and briefly spot evidence on the premises before leaving to try to find and save a crime victim, may they return after resolution of the emergency exigent circumstances and, still without a warrant, search for, identify and seize evidence?

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-v.-

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Mississippi, Smith v. State of Mississippi, 419 So.2d 563 (Miss., 1982) is set out in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on August 11, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Mrs. Shirley Williams, a white store clerk at a convenience outlet in Jackson, Mississippi was seized outside the Tote-Sum store on Robinson Street in the early morning of March 15, 1981, according to two black males driving by or stopped -- their account was unclear -- in a car in the road. The person using force upon Mrs. Williams, according to the two male blacks, was a short-medium height black male. The two purported witnesses, one of whom was a strapping specimen, saw no weapon being used by the assailant but were too afraid to intervene. Instead they told a Jackson police officer later about the alleged incident. The police officer returned to the scene of the alleged abduction and searched the area.

Later the police spotted a red Pinto, which had been described as the assailant's car, and stopped it, seizing the occupant with what might most appropriately be referred to as a great deal of vigor. The soon-to-be defendant claimed that the officers dropped a shoe belonging to the assault victim in his car while the officers claimed to have found it there. Defendant willingly directed the officers to the address of the person, Edward Charles McDonald, from whom he had borrowed the car. The officers obtained defendant's address -- about which they never queried defendant -- from McDonald and drove there.

Allegedly deeply concerned for Mrs. Roberts' safety, the officers rushed into defendant's dwelling at 109 Keystone Court without a warrant. They briefly glanced at various clothing and effects of defendant in his bedroom and then left the dwelling to search the grounds where they found Mrs. Roberts' corpse. After satisfying themselves that Mrs. Roberts was beyond help, the officers, still without a warrant, returned

to defendant's home and continued to search for evidence that the defendant had been involved with the victim and for identification of him according to the description of the purported eyewitnesses.

Defendant's explanation of the circumstances was that he had stayed at a wedding party late into the morning and returned home somewhat intoxicated and then decided to take a package to the University Medical Center. A defective muffler on his car caused him to return home to make repairs where he was frightened by lights in his house and the shadow of a large male with an afro hair style. Defendant then fell asleep; awakening he drove once again down Robinson Road where the police picked him up.

It was pointed out at trial that the key alleged eyewitness to the abduction, one Thomas, had been unable to identify the defendant at a showup before the trial and had tentatively identified him from photographs the day before the trial. Thomas himself was in trouble with the criminal justice system and faced at the very least revocation of parole and perhaps even a long sentence. This problem may have caused him to make an identification at the behest of law enforcement officals, defense counsel stated at trial.

No fingerprint evidence was taken by the police although appropriate surfaces such as the plastic of the victim's credit cards were available. No plaster of Paris casts were taken of the shoe prints leading down the drag trial behind defendant's home leading to the ditch where the victim's body was found, although the prints had been undisturbed and were available for examination.

Furthermore, the defendant steadfastly maintained his innocence in the face of competent police interrogation and never confessed to any involvement with Mrs. Roberts. Thus the evidence against defendant was almost entirely circumstantial as the prosecution well recognized and pointed out at voir dire.

Ineffectiveness of Gregg as defense counsel was demonstrated by his supineness at voir dire, most obviously envinced by his telling the prospective jurors that he knew that the entire Jackson, Mississippi community was fed up with convenience store robberies and that he nevertheless hoped that each juror could maintain an objective attitude regarding his client's case (transcript 404-405).

Similarly, on voir dire, Mr. Gregg dwelt on what he described as the fear and stress involved in deciding a capital case and the problems facing prospective jurors in being exposed to gruesome kinds of evidence. Speaking to a combat veteran of Worl War II on the panel, defense counsel approached this problem almost from the prosecution's point of view with emphasis on the notion that the veteran was inured to seeing death and dying in violent contexts (transcript 428-436).

Further, Mr. Gregg asked prospective jurors whether the defendant's common law marital relationship would cause them any prejudice against his client, and he did the same with the defendant's drunkenness on the night he was supposed to have murdured Shirley Roberts (transcript 451-453). Here again, he seemed to be doing the prosecution's work for it.

Furthermore, in closing, which he was forced to do himself after trying to put on his son, a college student, Gregg stated, "Ladies and gentlemen, I certainly don't usually put titles on my efforts to address the jury but I put a title on this one. And that title is: Why me, dear God, why me? But when the mother of this young man appeared at my office with some members of his family and announced that they wanted to employ me to defend Willie Albert Smith who was charged with the murder -- the brutal murder that I had read about -- was in jail for the murder of a white woman, again I said: "Dear

God, why me?' On that particular day I thing (sic) if I could have found the back door I would have ran out but I would have had to go by them and that would be rude." (transcript, 1403).

While in our adversary system of justice, the give and take between evenly matched counsel might be likened to a cock fight, the kind of bear-baiting that occurs in a capital trial where the witness takes the stand and his counsel is so worried about his public image that he will not take aggressive measures to protect his client's interests is clearly impermissible, e.g.

A. I wasn't having no intention of running. Running for what? For you to bring me back up here and kill me?

Q. Is that what you want us to do?

A. What?

Q. That's the second time you have said we want to bring you back and kill you.

A. There ain't no telling what you want to do, you know.

Q. Is that what you want us to do?

A. No. (Transcript, 1308)

And further:

Q. You wanted the cop to kill you that morning. What's different about now?

A. I didn't want him to kill me.

Q. But you wouldn't fight him.

A. Say what?

Q. You wouldn't try to push him off.

A. What I'm gonna fight him for?

Q. You wouldn't even try to push him off.

A. What I want to fight him for? I couldn't push him.

Q. You answer the questions. You don't ask the questions. (Transcript, 1309)

Defense counsel's first objection to argumentativeness came considerably later in the trial (transcript, 1531).

The DA further discussed what had transpired in conference between counselor Gregg and defendant Willie Albert Smith regarding the length of sentence available for Smith if he took a guilty plea. The wide-ranging, aggressive inquiry of the DA should at the least have met with an objection as to attorney-client privilege, but there was none (transcript 1527-1528).

Moreover, the prosecution called the victim's daughter to the stand to identify exhibits (her mother's effects) which had been previously received, marked and identified into evidence. The main purpose of this exercise seemed to be the obtaining of the girl's breaking down on the stand. There was no objection as to lack of materiality by defense counsel (transcript, 1038).

Despite occasional objections to the prosecution's bringing in evidence of rape such as pubic hair found in bed-clothes and in the victim's pubic area (defendant's hair), the defense did not continuously and effectively object to such evidence regarding a crime not mentioned in the indictment. See testimony of technician Andrews, transcript 1112-1116.

Harassment of the defendant with repetitious and non-probative eliciting of details as to his apartment's layout and how he tossed his clothes off occurred without objection, transcript 1177-1182. Much more grossly overreaching was the prosecution's constant reference to the victim's breast area and her brassiere (which was introduced into evidence without any groundwork being laid for its probative value), see e.g. transcript 1192, query as to whether defendant pulled the victim's bra up. Finally, at transcript 1298, the DA asked rhetorically the defendant, "You don't know how her bra got pulled up either, do you?" and finally at transcript 1299, "Was she screaming while you were choking her, Mr. Smith?" All this transpired without objection as to inflammatoriness by the defense.

The defense was effective in pointing out that the defendant had never confessed under competent interrogation while incarcerated, that the positive eye-witness identification claimed by the prosecution was made from photographs the day before trial and not at the shop where the witness failed to identify Mr. Smith (counsel pointed out that one of the two purported eye-witnesses was facing revocation of bail and perhaps time in jail on another charge), and that no positive fingerprint identification had been made of defendant although proper surfaces such as that on victim's credit cards had been available, and plaster of Paris casts of footprints leading to the site where the victim's corpse had been dumped in a ditch had never been made or identified to defendant's shoes.

In regard to morale in taking on the prosecution in the admittedly difficult task of taking on the prosecution in an interracial murder, with rape of the victim constanly implied, however, defense counsel was sadly lacking, and his failure to press his case without regard to unpopularity or public opinion amounts to ineffectiveness in representation.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PRESENTED BELOW

Appellate counsel for the defense petitioner in the Mississippi Supreme Court did not raise the question of trial counsel's competence. At 419 So.2nd 563, 574, the Mississippi Supreme Court stated, "At the trial the defendant was ably defended by astute counsel retained by his family."

The Fourth Amendment issue of search and seizure without a warrant, a procedure strictly circumscribed by the Chimel v. California, 395 U.S. 752 (1969), was raised both at trial and on appeal in the Mississippi Supreme Court, which found that the reentry of defendant's promises after the condition of exigent

circumstances (rescue of a crime victim) had expired was justified by a broad reading of Coolidge v. New Hampshire, 405 U.S. 443 (1971).

REASONS FOR GRANTING THE WRIT

In assessing an attorney's competence and his adequacy in rendering an accused reasonably effective assistance of counsel conscientious and diligent effort is the gravamen of the requirement, U.S. v. Bridgeman, 523 F.2d 1099 (CADC, 1975). Where a motion that might have been helpful is omitted by counsel, the issue probative of incompetency is whether the motion would have prevailed and whether such a victory would have turned around the result of the trial for the defendant, Gaines v. Hopper, 430 F. Supp. 1173 (MD Ga., 1977). While, generally, review of competency centers on adequacy of preparation of the case rather than a poor choice of trial strategies, Brubaker v. Dickson, 310 F.2d 30 (9th Cir., 1962), failure to raise an insanity defense at trial where it was the only effective defense available was held in U.S. ex rel. Lee v. Rowe, 446 F. Supp. 1039 at 1045 (ND Ill., 1978) to be evidence of incompetence or ineffectiveness. The basis for finding that the Lee counsel failed to pursue the best trial strategy was found in inadequate preparation of the case, but the Lee decision nevertheless does fault an attorney for a poor choice of tactics. Furthermore, where an attorney admits that his trial efforts resulted in being "sandbagged" by the prosecution and he fails in suppressing key evidence infirm from a Fourth Amendment point of view, failure to afford effective representation can be found, provided the error is not harmless, Moran v. Morris, 478 F. Supp. 145 (CD Cal., 1979).

The court made a finding of ineffective representation where counsel had no previous trial experience and had misrepresented his membership in the local bar. Tactically poor judgment may not alone be sufficient to trigger a finding of ineffectiveness but

when combined with non-membership incompetency is a reasonable finding, U.S. v. Butler, 504 F.2d 220 (D.C. Cir., 1974).

In the case at bar, defense attorney Gregg, citing angina pain at the close of trial, offered to put on his son, an undergraduate at Mississippi College, to make the closing argument. While nurturance and training of the oncoming generation may be an important value in our society, had attorney Gregg succeded in his wish to put on a person without bar membership or law school training in a crucial stage of the trial, the Butler situation would have been triggered.

Originally, the test for counsel's adequacy in representation was the farce and mockery standard, to wit that the attorney's general performance must be so deficient that the resultant proceeding must make a farce and a mockery of the notion of justice. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir., 1978), noted that several circuits once held to this test and subsequently abandoned it, 586 F.2d 1325 at 1328. Today's modern standard held by the majority of circuits* states that mere reputability of counsel will not in and of itself refute a challenge to counsel's competent conduct of a criminal trial but that effective assistance must offered that is "'within the range of competence

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* The decisions of the circuits abrogating the farce and mockery test and adopting the reasonable competence test are as follows: United States v. DeCoster, 159 U.S. App. D.C. 326; 331, 487 F.2d 1197, 1202 (D.C. Cir. 1973); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir., 1978); Moore v. United States, 432 F.2d 730, 736 (3rd Cir., 1970); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir., 1977, cert. denied 435 U.S. 1011 (1978); Akridge v. Hopper, 545 F.2d 457, 459 (5th Cir.), cert. denied 431 U.S. 941 (1977); United States v. Toney, 527 F.2d 716, 720 (6th Cir., 1975), cert. denied 429 U.S. 838 (1976); United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir.), cert. denied, 423 U.S. 876 (1975); Reynolds v. Marbry, 574 F.2d 978 (8th Cir., 1978), Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir., 1978), cert. denied, 440 U.S. 945 (1980); and Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980). The Second Circuit's retention of the farce and mockery test is exemplified by Rickenbacker v. Warden, 550 F.2d 62, 65 (2nd Cir., 1976).

demanded of attorneys in criminal cases,'" ibid at 1329, citing McMann v. Richardson, 397 U.S. 759 at 771 (1970).

In dissenting from the denial of certiorari in Romero v. U.S., docket 81-6463, 51 U.S. Law Week 3284, Mr. Justice White noted that the influential Second Circuit had remained steadfast in its adherence to the farce and mockery test while every other circuit has adopted a "reasonable competence" standard or some variant thereof. Mr. Justice White strongly implied the necessity of harmonizing this conflict and securing a uniform standard for effectiveness of counsel's assistance.

The state of Mississippi maintains the farce and mockery test of competence, Henry v. State, 154 So.2d 289 at 296, (1963); Rogers v. State, 307 So.2d 551 at 553 (1975). In addition, the Mississippi courts have held that where an accused retains his own counsel, he is barred from questioning that attorney's competency, Miller v. State, 231 So.2d 178 (1970).

The Mississippi Supreme Court believed that the cursory observations of the officers the first time they came into the premises at 109 Keystone Court was a "search" for evidence. The court rationalized that to preserve the integrity (if that is the right word) of the intrusion, they had to rush out of the house in pursuit of Mrs. Roberts' welfare to attempt to locate her on the grounds when it became obvious that she was not in the defendant's apartment. Having found Mrs. Roberts' body the court reasoned that the police might return --- without a warrant --- to continue their "search". In its tortured reasoning the court stated at 419 So.2d 563 at 573, "The original search in the present case was not completed due to the overriding importance of first locating Mrs. Roberts." The court blithely ignores the fact that after finding Mrs. Roberts the officers were still without a warrant and now had no exigent reasons for being on the premises at 109 Keystone Court, cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

(1971). Furthermore, the court makes a great leap of faith in entertaining the notion that the over-the-shoulder glances into the bedroom of the officers in search of Mrs. Roberts the first time they entered 109 Keystone Court constituted a "search" or even the beginnings of a search.

While it was held in U.S. v. Brand, 556 F.2d 1312 (5th Cir., 1977) that where an officer legally entered a house to assist ambulance attendants with a drug overdose victim, other officers could follow legally even when and though the exigent circumstances justifying the initial entry no longer existed (a result which the instant petitioners question given the reasoning of the court in U.S. v. Carter, 522 F.2d 666 at 674, infra), the officers must confine their intrusion to the scope of the original invasion unless a warrant is issued mandating a more wide-ranging search. Here the initial intrusion involved a cursory-at-best "search," and pace Brand no justification for more than a glance at the inside of the dwelliing existed for returning officers.

The seriousness of the offense of homicide with which a defendant was charged did not, of itself, present such exigent circumstances as to justify a four-day search of an apartment after arrests were made, especially since no emergency threatening life and limb or the integrity of the law enforcement process was involved (no warrant had been issued), Mincey v. Arizona, 437 U.S. 385 (1977). It was held that the original intrusion of the apartment to arrest Mincey (cf. to find Mrs. Roberts) was not so great as to justify the additional intrusion of the four-days' intensive search.

While officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would allow the escape of the suspect or the destruction of critical evidence, Katz v. U.S., 389 U.S. 347 (1967), see also Warden of Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967),

the case of Chimel v. California, 395 U.S. 752 (1969) defined as unreasonable a warrantless search incident to a lawful arrest that went beyond defendant's person and that area from which he might feasibly have obtained a weapon or something that might have been used in evidence against him. Further, U.S. v. Nelson, 459 F.2d 884 (6th Cir., 1972) saw at least one circuit court strictly and narrowly limit exigent circumstances exceptions allowing warrantless searches, particularly when applied to residential premises.

The problem is, as stated in U.S. v. Carter, 622 F.2d 666 (D.C. Cir., 1975), that Coolidge may be seen by some courts as a bludgeon for destroying the strict limitations on warrantless searches incidental to the seizing of a perpetrator established by Chimel. Carter involed hot pursuit of an individual with an arrest but not a search warrant and entry of his attic to search for dangerous contraband with the rationale that his armed cohorts might be hiding there.

The Carter court stated:

> In considering the circumstances of this seizure in the context of "plain view" analysis, it is of consequence that we heed warning of the Supreme Court in Coolidge v. New Hampshire that "to permit warrantless plain-view seizures without the limit would be to undo much of what was decided in Chimel..." 522 F.2d 666 at 674.

The circumstances of Carter, the possible presence of armed men in the house where a cache of stolen arms was located, did not present sufficient justification for a "protective" search of the entire house; it was stated that a rule permitting warrantless searches residence-wide in any instance where an arresting officer hypothesized the presence of armed felons or noticed a potential vantage point for a sniper might very well abollish the Chimel doctrine for all but plate glass houses, ibid at 675.

The police in the instant case barely noticed much less seized any evidence in their first exigently justified entry into 109

Keystone Court, cf. Mincey, 437 U.S. 385 at 392-393, where a rescue exception is allowed as to seizing plain view evidence. Under these circumstances, Brand, Mincey, and Carter define strong limitations on what they might search for and seize on a second visit the 109 Keystone Court premises without any justification of exigent circumstances.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

/s/

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